

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

EUSEBIO ALVAREZ MALAGA (8),

Defendant.

No. 12-CR-6053-EFS-8

**ORDER DENYING 28 U.S.C. § 2255
MOTION**

Before the Court, without oral argument, is Defendant/Movant Eusebio Alvarez Malaga's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, ECF No. 1089, filed October 10, 2014. Having reviewed the pleadings and the file in this matter, the Court is fully informed and denies the motion.

I. BACKGROUND

Mr. Alvarez Malaga was charged with conspiracy to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine (Count 1), using a minor to possess with the intent to distribute and to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine (Count 2), and knowingly attempting to possess with the intent to distribute 50 grams or more of actual methamphetamine (Count 3). Superseding

1 Indictment, ECF No. 329. With the assistance of his counsel William
2 Schuler a Plea Agreement was reached between Mr. Alvarez Malaga and
3 the United States Attorney's Office (USAO). Mr. Alvarez Malaga agreed
4 to plead guilty to Count 1. Plea Agreement, ECF No. 745. The USAO
5 agreed to dismiss the remaining charges and to recommend that Mr.
6 Alvarez Malaga be sentenced to the low end of the applicable
7 Sentencing Guideline range. *Id.* The Court accepted Mr. Alvarez
8 Malaga's guilty plea as knowing, intelligent, and voluntary, not
9 induced by fear, coercion, or ignorance. Change of Plea Hearing
10 Transcript, ECF No. 1111, at 66.

11 Mr. Alvarez Malaga initially faced a Sentencing Guideline range
12 of 235 to 293 months, but after he timely accepted responsibility and
13 met the criteria in section 5C1.2 of the Guidelines, he received a
14 five-level reduction in offense level, which resulted in a Guideline
15 range of 135 to 168 months. Presentence Investigation Report, ECF No.
16 873, at 13-14. On November 19, 2013, Mr. Alvarez Malaga was sentenced
17 to 120 months imprisonment and five years of supervised release.
18 Judgment, ECF No. 898. Mr. Alvarez Malaga did not appeal his
19 sentence.

20 **II. MOTION UNDER SECTION 2255**

21 Mr. Alvarez Malaga filed a section 2255 motion on October 10,
22 2014. ECF No. 1089. He moved the Court to correct his sentence on
23 three grounds:

24 GROUND ONE: Defense counsel refused to file a notice of appeal,
25 contrary to Mr. Alvarez Malaga's explicit instructions.
26

GROUND TWO: Defense counsel failed to conduct a reasonably adequate investigation before advising Mr. Alvarez Malaga to plead guilty and failed to "make various objections based on a decision that was subsequently, overruled." ECF No. 1089, at 6.

GROUND THREE: Defense counsel permitted an excessive sentence to be imposed without objection or attempt at mitigation under the United States Sentencing Guidelines.

The Court previously dismissed Grounds One and Three¹ and ordered the USAO to respond to Ground Two. ECF No. 1091. The USAO responded to and opposed Mr. Alvarez Malaga's motion on January 23, 2015. ECF No. 1111. The USAO argues that defense counsel's representation was within a reasonable standard of conduct and that Mr. Alvarez Malaga was not prejudiced by any alleged deficiency.

A. Applicable Law

Section 2255 provides the following:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to . . . correct the sentence.

. . . [T]he court shall . . . determine the issues and make findings of fact and conclusions of law with respect to [the motion]. If the court finds . . . that there has been such a denial or infringement of the constitutional rights

¹ In the Court's prior order, it incorrectly stated that Mr. Alvarez Malaga received the lowest sentence the Court was permitted to impose. ECF No. 1091, at 4. Because Mr. Alvarez Malaga had met the requirements of section 5C1.2, the Court was permitted to impose a sentence below the mandatory minimum of 120 months. However, after considering the guideline range and the 18 U.S.C. § 3553 factors, the Court imposed a 120-month sentence. The Court's misstatement does not affect its conclusion that the sentence was plainly not excessive and that defense counsel was plainly not ineffective by permitting an excessive sentence to be imposed without objection or attempt at mitigation. As explained above in Section I, the 120-month sentence was the result of defense counsel's successful attempts at mitigation.

1 of the prisoner as to render the judgment vulnerable to
2 collateral attack, the court shall vacate and set the
judgment aside and shall . . . correct the sentence as may
appear appropriate.

3 28 U.S.C. § 2255. Rule 8(a) of the Rules Governing Section 2255
4 Proceedings provides that upon receiving Mr. Alvarez Malaga's motion
5 and the USAO's response the Court shall "determine whether an
6 evidentiary hearing is required. If it appears that an evidentiary
7 hearing is not required, the judge shall make such disposition of the
8 motion as justice dictates." A hearing is required if the defendant's
9 allegations require the court to look at facts outside the files and
10 records. *Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994).

11 **B. Discussion**

12 Mr. Alvarez Malaga asserts that he received ineffective
13 assistance of counsel because his attorney failed to conduct a
14 reasonably adequate investigation before advising him to plead guilty
15 and also failed to make objections based on a decision that was
16 subsequently overruled. The right to effective assistance of counsel
17 in criminal proceedings is bestowed by the Sixth Amendment. This
18 right is violated when (1) counsel's performance falls below an
19 objective standard of reasonableness and (2) the defendant is
20 prejudiced by such deficiency. *Hill v. Lockhart*, 474 U.S. 52, 57-58
21 (1985) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The
22 reviewing court is highly deferential to counsel's chosen performance
23 and considers counsel's decisions in the context of counsel's
24 perspective at the time, rather than through "the distorting effects
25 of hindsight." *Strickland*, 466 U.S. at 689.

1 "A convicted defendant making a claim of ineffective assistance
2 must identify the acts or omissions of counsel that are alleged not to
3 have been the result of reasonable professional judgment."
4 *Strickland*, 466 U.S. at 690. Mr. Alvarez Malaga argues that Mr.
5 Schuler's performance was ineffective because he did not conduct a
6 reasonably adequate investigation. He does not provide specific facts
7 to indicate how Mr. Schuler's investigation was inadequate, nor does
8 he suggest what additional investigation would have uncovered that
9 could have affected his decision to plead guilty or the Court's
10 sentencing analysis. Likewise, he does not indicate which "decision
11 that was subsequently overruled" should have served as the basis for
12 objections by Mr. Schuler.²

13 The Court's review of the record has not revealed any acts or
14 omissions of defense counsel that fall outside the "reasonable
15 professional judgment" standard. Instead, the Court finds that Mr.
16 Schuler provided more than adequate representation under the
17 circumstances of this particular case. It is "well within the range
18 of reasonable competence" to advise a defendant to plead guilty early
19 in the proceedings when the evidence against the defendant is "already
20 overwhelming," "time [is] of the essence for locking the government
21 into a plea agreement," and an early plea agreement will allow the
22 defendant to cooperate with the government in an effort to mitigate
23 his sentence. *United States v. Campa*, 61 F.3d 912, at *3 (9th Cir.
24 1995) (unpublished). Here, Mr. Schuler joined his client in all pre-

25 ² The Court notes that if the decision was overruled subsequent to imposition
26 of Mr. Alvarez Malaga's sentence, Mr. Schuler's decision not to object on
that basis cannot be considered deficient when viewed "from counsel's
perspective at the time." *Strickland*, 466 U.S. at 689.

1 trial motions, including the extensively litigated motions to
2 suppress. He ensured that his client would qualify for sentencing
3 reductions and presented mitigating factors to the Court at
4 sentencing. Mr. Alvarez Malaga has not articulated what more Mr.
5 Schuler should have done, and he fails to overcome the "strong
6 presumption that counsel's conduct falls within the wide range of
7 reasonable professional assistance." *Strickland*, 466 U.S. at 689.

8 Additionally, Mr. Alvarez Malaga has not shown that he was
9 prejudiced by his counsel's alleged deficiencies. "In order to
10 satisfy the 'prejudice' requirement, the defendant must show that
11 there is a reasonable probability that, but for counsel's errors, he
12 would not have pleaded guilty and would have insisted on going to
13 trial." *Hill*, 474 U.S. at 59. The Court must consider whether the
14 potentially exculpatory evidence or possible affirmative defense that
15 counsel allegedly failed to discover would have likely changed the
16 outcome of a trial and thus counsel's recommendation that his client
17 plead guilty. *Id.* Here, Mr. Alvarez Malaga has not pointed to—and
18 the Court has not discovered—any potentially exculpatory evidence or
19 possible affirmative defenses of which Mr. Schuler was not aware. The
20 evidence against Mr. Alvarez Malaga included intercepted phone
21 conversations, law enforcement surveillance, evidence from a GPS
22 tracker, and the fact that he was arrested while driving a vehicle
23 with 34 pounds of methamphetamine in a secret compartment. The Court
24 finds that there is no information suggesting that further
25 investigation would have had any impact on the overwhelming evidence
26 against Mr. Alvarez Malaga.

Accordingly, **IT IS HEREBY ORDERED:**

1. Mr. Alvarez Malaga's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, on the basis of ineffective assistance of counsel, **ECF No. 1089**, is **DENIED**.
2. The Clerk's Office is directed to **CLOSE** this file and the related civil file, 4:14-CV-5108-EFS.
3. The Court **DECLINES** to issue a certificate of appealability because Mr. Alvarez Malaga has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to counsel and to Mr. Alvarez Malaga.

DATED this 3rd day of February 2015.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge